Supreme Court, U.S.
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No. 91-1894

In the Supreme Court of the United States

OCTOBER TERM, 1992

TRUITT V. LIVELY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR UNITEDBANK — HOUSTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. 12 U.S.C. 1821(d)(2)(A) (Supp. II 1990) provides that, in its capacity as receiver of an insolvent financial institution, the Federal Deposit Insurance Corporation (FDIC) succeeds to the institution's "rights, titles, powers, and privileges"; under 12 U.S.C. 1821(d)(2)(B) (Supp. II 1990), the FDIC may "collect all obligations and money due the institution." The question presented is whether, pursuant to these provisions, the FDIC succeeed to an institution's rights under a guaranty.

2. Whether petitioner raised a genuine issue of material fact in challenging the validity of a foreclosure sale under Texas law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is unreported, but the judgment is noted at 952 F.2d 400 (Table). The opinion of the district court (Pet. App. 13-18) is reported at 760 F. Supp. 115.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1992. A petition for rehearing was denied on February 27, 1992. Pet. App. 9-10. The petition for a writ of certiorari was filed on May 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was the president of the Gettysburg Corporation. In September 1985, acting on behalf of Gettysburg, petitioner executed and delivered to United-Bank-Houston a promissory note for $926,926.56 and a deed of trust on real property owned by Gettysburg. Pet. App. 2. Petitioner also executed and delivered a personal guaranty of all debts owed by Gettysburg to United Bank-Houston. *Ibid.*

On April 30, 1987, the Texas Banking Commissioner declared UnitedBank-Houston insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) the federal receiver for the bank. Pet. App. 2. As receiver, the FDIC succeeded to all of the rights, titles, powers, and privileges of the bank. 12 U.S.C. 1821(d)(2)(A) (Supp. II 1990).

Gettysburg and petitioner subsequently defaulted on the note and the personal guaranty. Pet. App. 2-3. The FDIC proceeded with foreclosure under the deed of trust. It provided notice of the foreclosure sale on September 15, 1987. *Id.* at 3. On October 6, 1987, the property was sold at foreclosure for $170,000. *Ibid.* After the proceeds of the sale were applied to reduce the balance due on the note, a deficiency of $794,691.15 remained. *Ibid.*

2. In November 1988, the FDIC filed its original petition against petitioner and Gettysburg in Texas state court, seeking to recover the deficiency. Pet. App. 3. In September 1989, the FDIC removed the action to the United States District Court for the Southern District of Texas, as permitted under the then-recently enacted Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101-73, § 209(b), 103 Stat. 216. Pet. App. 3. The FDIC subsequently moved for summary judgment in its favor on all claims.

The district court granted summary judgment in favor of the FDIC. It held, in relevant part, that the FDIC was the proper party to enforce petitioner's obligations under the guaranty. It also held that petitioner had not established any material irregularities in the foreclosure sale. Pet. App. 15-17.

3. The Fifth Circuit affirmed in an unpublished, per curiam opinion. Pet. App. 1-8.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner first claims (Pet. 6-9) that his guaranty ran only to UnitedBank-Houston's corporate successors or assigns and that the FDIC did not qualify as either. Therefore, he argues, the FDIC could not enforce the guaranty. The court of appeals correctly rejected that argument. Pet. App. 7.

The FDIC was the successor to "all rights, titles, powers and privileges" of United-Bank Houston, pursuant to 12 U.S.C. 1821(d)(2)(A)(i) (Supp. II 1990). Under 12 U.S.C. 1821(d)(2)(B) (Supp. II 1990), the FDIC was entitled to "collect all obligations and money due the institution," as well as to "preserve and conserve [its] assets and property." These two provisions plainly empowered the FDIC to enforce petitioner's guaranty to United Bank-Houston. The guaranty conferred "rights" (12 U.S.C. 1821(d)(2)(A)(i) (Supp. II 1990)) upon United Bank-Houston as against petitioner, to which the FDIC succeeded when it was appointed receiver for the bank. Those rights included the right to "collect * * * money due [UnitedBank-Houston]" (12 U.S.C. 1821(d)(2)(B) (Supp. II 1990)) from petitioner as a result of his de-

faulting on the guaranty of Gettysburg's debt to the bank.

Contrary to petitioner's contention (Pet. 7), the court of appeals did not create a "new" category of successors who may enforce a guaranty. Instead, the court merely gave effect to statutory provisions that authorize the FDIC to enforce the debts due to the failed institution and thereby maximize the assets of the institution available for payment of creditors. Petitioner nevertheless argues that the guarantor of a debt has no obligation to the successor of the debt-holder if the succession occurs by operation of federal statute rather than by private agreement. Petitioner thus seeks to release personal guarantors of debts to financial institutions from any obligation to make good on their promise when the FDIC is appointed receiver. Petitioner does not explain, however, why such a windfall should be available to personal guarantors, alone among the obligors of the institution. Petitioner's position is squarely at odds with the plain purpose of 12 U.S.C. 1821(d)(2) (Supp. II 1990).

2. Petitioner also argues (Pet. 9-12) that the court of appeals erred in concluding that the foreclosure sale was proper under Texas law. In an effort to cast this argument as one appropriate for this Court's review, petitioner asserts that the court of appeals' interpretation of Texas law conflicts with the Ninth Circuit's interpretation of California law in *In re Worcester*, 811 F.2d 1224 (1987). Pet. 10. This effort is obviously unavailing; the two decisions apply the laws of different States to different sets of facts. Petitioner thus fails to establish a federal issue warranting further review. In any event, the courts below correctly determined that petitioner's state-law challenge to the foreclosure sale did not raise a triable fact.

Under Texas law, a foreclosure sale cannot be set aside unless the party challenging the sale can prove

both that the property was sold for a grossly inadequate price and that there was a material irregularity in the sale procedure. See, *e.g.*, *Savers Fed. Sav. & Loan Ass'n* v. *Reetz*, 888 F.2d 1497, 1503 (5th Cir. 1989); *American Sav. & Loan Ass'n* v. *Musick*, 531 S.W.2d 581, 587 (Tex. 1975); *Nautical Landings Marina, Inc.* v. *First Nat'l Bank in Port Lavaca*, 791 S.W.2d 293, 298 (Tex. Ct. App. 1990), writ denied (Dec. 19, 1990). Petitioner did not make either showing.

First, petitioner failed to show that the property was sold for a grossly inadequate price. The district court found that the price for which the property sold was "not deficient," observing that the property was sold for "over 85% of the appraised value." Pet. App. 15. The court of appeals summarily affirmed on this issue. *Id.* at 7. Although petitioner disputes this finding, he provides no reason why this Court should depart from its practice of declining to review factual findings concurred in by both courts below. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987). Under Texas law, petitioner's failure to establish that the sale price was grossly inadequate, standing alone, defeated his challenge to the sale.

Moreover, none of the aspects of the sale cited by petitioner had a material effect on the sale. Petitioner first asserts that an error in the notice of foreclosure sale "could have caused a chilling [effect on] the bidding." Pet. 10. Petitioner did not, however, present any evidence that the error—which consisted of the listing on the notice of a lot that was not subject to UnitedBank-Houston's lien—actually affected the sale. In the absence of evidence of actual prejudice, petitioner's mere speculation of a "chilling" effect was inadequate as a matter of law to set aside the sale. See *Diversified Developers, Inc.* v. *Texas First Mortgage REIT*, 592 S.W.2d 43, 44 (Tex. Civ. App. 1979).

Petitioner next asserts that the FDIC did not provide 21 days' notice of the sale, as required by law. Pet. 11. That assertion is incorrect. Notice of the scheduled foreclosure sale was mailed to petitioner Gettysburg on September 15, 1987; the sale occurred on October 6, 1987. Pet. App. A3. Counting the day of the sale, as is permitted under Texas law, 21 days elapsed. *Hausmann* v. *Texas Sav. & Loan Ass'n*, 585 S.W.2d 796, 801 (Tex. Civ. App. 1979), writ refused n.r.e. (Jan 23, 1980); *Hutson* v. *Sadler*, 501 S.W.2d 728 (Tex. Civ. App. 1973).

Finally, petitioner observes that the deed of trust contained a scrivener's error setting the time of sale as between 10:00 *P.M.* and 4:00 P.M., rather than between 10:00 *A.M.* and 4:00 P.M. Pet. 11. The time of the sale was accurately reported, however, in the notice of sale, as required by Texas Prop. Code § 51.002 (Vernon 1987), and the sale was actually held at 2:30 P.M. on October 6, 1987. FDIC C.A. Br. 31-32. In the absence of evidence of actual prejudice, errors of this sort do not suffice under Texas law to set aside a foreclosure sale. See *Nautical Landings Marina*, 791 S.W.2d at 299; *Jasper Fed. Sav. & Loan Ass'n* v. *Reddell*, 730 S.W.2d 672, 674-675 (Tex. 1987); *University Sav. Ass'n* v. *Springwoods Shopping Center*, 644 S.W.2d 705, 706 (Tex. 1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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